IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1384 OF 2004

Shri Subhash Choudhary,
who is presently lodged
at Arthur Road Central Prison,
Residing at: E-006, Hrushikesh C.H.S.
Apna Ghar Society Ltd.,
Lokhandwala Complex, Off Link Road,
Andheri (West), MUMBAI-400 071. ...Petitioner

Versus

1.Mr.Deepak Jyala,
Intelligence Officer,
DRI, MUMBAI.

2.State of Maharashtra

3.Union of India,
Central Govt.Advocates,
2nd Floor, Aayakar Bhavan Annexe,
New Marine Lines, Mumbai. ...Respondents

ALONG WITH

CRIMINAL APPLICATION NO.3618 OF 2004

Shri Satish Choudhary,
Aged : 54 Years,
Residing At: 1st Floor,
Arunodaya, Bapu Bhai Vashi Road,
Vileparle, Mumbai-400 056. ...Applicant

Versus

1.Shri S.K.Singh,
Senior Intelligence Officer,
DRI, Nhava Sheva,
Dist:Raigad, Maharashtra.

2.Union of India,
Central Govt.Advocates,
2nd Floor, Aayakar Bhavan,
Mumbai.

3.State of Maharashtra ...Respondents

Mr.Mukul Rohatgi with Mr.S.N.Kantawala and
Mr.Yogesh Rohira for Petitioner & the Applicant.
Mr.D.A.Nalawade for Respondent No.1.
Mr.D.R.More, A.P.P. for State.

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CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 20, 2004.

ORAL JUDGMENT :

1. The above numbered Writ Petition takes exception to the order passed by the Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai dated 8th July 2004 below Remand Application No.71 of 2004, remanding Mr.Subhash Choudhari, Writ Petitioner to judicial custody till July 22, 2004. The principal ground on which the remand order is questioned on behalf of the writ petitioner is that the offence for which he has been arrested is one under Section 135(1)(ii) of the Customs Act, 1962 (hereinafter referred to as

the 'Act'), which is a bailable offence; for which reason, the Magistrate could not have ordered judicial remand of the writ petitioner. In the accompanying Criminal Application No.3618 of 2004, another named accused in the commission of the same offence Shri Satish Choudhary has prayed for release on anticipatory bail on the same argument that the said offence is a bailable offence.

2. Briefly stated, the Respondent is investigating against four export firms namely; M/s.Shree Shubham Exports (Pvt.) Ltd., M/s.Emkay Exports, M/s.Tex Age and M/s. Master Forms (Pvt.) Ltd., which are admittedly controlled by said Shri Subhash Choudhary, regarding alleged over-valued exports of "readymade garments" since about a year prior to commencement of inquiries. It is not necessary to burden this Judgment with the background in which the said investigation has commenced. Suffice it to observe that it is not in dispute that the alleged offence for which the applicants in both the matters are stated to be involved, is, inter alia, punishable under Section 135(1)(ii) of the Act. The Customs Officers have,

therefore, exercised power to arrest the writ Petitioner under Section 104 of the Act.

3. The principal question is: whether the offence referable to Section 135(1)(ii) of the Act for which the Applicants are being proceeded with, by the Customs Officers in exercise of powers under Section 104 of the Customs Act, can be said to be a bailable offence or a non-bailable offence? According to the Petitioner-Applicant, having regard to the Scheme of the Customs Act read with the provisions of the Code of Criminal Procedure (hereinafter referred to as the 'Code'), the offence under Section 135(1)(ii) of the Act is a bailable offence. This submission is canvassed relying on the provisions of Section 104 of the Act, which reads thus :

> **"104. Power to arrest.-**(1) If an officer of customs empowered in this behalf by general or special order of the Commissioner of Customs has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under section 135, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) Every person arrested under

> sub-section (1) shall, without unnecessary delay, be taken to magistrate.
>
> (3) Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of the releasing such person on bail or otherwise, have the same power and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).
>
> (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable."

. It is contended that Section 104(1) empowers the Customs Officer to arrest any person, if he has reason to believe that such person is guilty of offence punishable under Section 135 of the Act. Sub-section (2) of Section 104 obligates the Customs Officer to produce such person without unnecessary delay before the Magistrate. Sub-section (3) of Section 104 enables the Customs Officer to release the person who has been so arrested on bail or otherwise. While doing so, he can exercise same power as the Officer-In-charge of a Police Station has, and is subject to under the Code of Criminal Procedure. What is relevant to note is that sub-section (4) is a non-obstante

clause which provides that the offence under the Act shall not be cognizable, notwithstanding anything contained in the Code of Criminal Procedure. Section 104 refers to offence punishable under Section 135 of the Act which reads thus :

> **135.Evasion of duty or prohibitions.-** (1) Without prejudice to any action that may be taken under this Act, if any person-
>
> (a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or
>
> (b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be, or,
>
> (c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113,
>
> shall be punishable,-
>
> (i) in the case of an offence relating

to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine;

. Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than three years;

(ii) in any other case with imprisonment for a term which may extend to three years or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than one year.

(3) For the purposes of sub-section (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than one year, namely:-

(i) that fact that the accused has been convicted for the first time for a reference under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been

ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused."

(emphasis supplied)

4. Insofar as present case is concerned, it is not in dispute that Section 123 of the Act has no application, for which reason provisions of Section 135(1)(ii) will be attracted. The said provision postulates that in any other case of an offence other than an offence, relating to any of the goods to which Section 123 of the Act applies and the market price whereof exceeds one lakh of rupees, the imprisonment will be for a term, which may extend to three years, or with fine, or with both. It is mainly construction of this provision, that is put in issue before this Court.

5. According to the Petitioner-Applicant, if

the punishment for offence referable to Section 135(1)(ii) is only for imprisonment for a term which may extend to three years, or with fine, or with both, in that case, the provisions of Part II of 1st Schedule of the Code would be applicable, and in particular, third entry therein which postulates that the offence will be non-cognizable and bailable. Before proceeding further, it would be appropriate to advert to the said Table (Part-II) contained in the 1st Schedule to the Code, which reads thus:

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what Court triable
If punishable with death, imprisonment for life, imprisonment for more than 7 years.	Cognizable	Non-bailable	Court of Session.
If punishable with imprisonment for 3 years and upwards but not more than 7 years.	Ditto.	Ditto.	Magistrate of the first class.
<u>If punishable with imprisonment for less than 3 years or with fine only</u>.	<u>Non-cognizable</u>	<u>Bailable</u>	<u>Any Magistrate</u>.

(emphasis supplied)

6. The expression "bailable offence" has been defined in the Code in Section 2(a) which reads thus:

> "2. Definitions.-In this Code, unless the context otherwise requires,-
>
> (a) "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence.
>
> ....."

7. It is also relevant to note that Section 138 of the Act expressly provides that offence such as under Section 135 (1)(ii) shall be tried summarily by a Magistrate. Accordingly, relying on the scheme of the provisions of the Act read with the Code, learned Counsel for the Petitioner-Applicant submits that the conclusion that the offence under Section 135(1)(ii) is bailable, is inescapable. Reliance is also placed on the Customs Manual issued by the Ministry of Finance which also reinforces the stand taken on behalf of the Petitioner-Applicant that such offence is bailable offence. Para 26(c) of the

Customs Manual reads thus :

> 26. The offences punishable with imprisonment for a term of less than 3 years or only fine are covered in this category. The offences under this category are as follows :-
>
> (a) .....
>
> (b) .....
>
> (c) In all offences under the Customs Act other than those mentioned under 'non-bailable or cognisable offences' above, the punishment for imprisonment may extend to a term of three years, or with fine, or with both. However, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year (section 135(i).
>
> (d) .....
>
> (e) ....."
>
> (emphasis supplied)

8. Counsel for the Petitioner-Applicant has also fairly invited my attention to the decision of the Division Bench of the Gujarat High Court, which has had an occasion to deal with the similar contention in the case of **N.H.Dave Inspector of Customs vs. Mohmed Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatti) & Ors. reported in 1984 (15) E.L.T. 353 (Guj.).** It is, however, submitted

that in that case the Gujarat High Court was concerned with offence referable to Section 135(1)(i) and not Section 135(1)(ii) as in the present case. It is submitted that the parameters in so far as the offence under Section 135(1)(i) are stringent, and the same is non-bailable offence, having regard to the punishment provided therefor may extend to over three years. This position is reinforced from the observation made by the Division Bench in Para 3 of the reported Judgment, which clearly refers to the seizure of contraband gold valued at about Rs.1.40 Crores, which means that the seizure was with reference to the goods relating to Section 123 of the Act for which reason, offence was under Section 135(1)(i) of the Act. Indeed, in Paragraph 5 of the same decision, the Division Bench has overruled the decision of the Single Judge which had taken the view that an offence under Section 135 of the Customs Act is a bailable offence, but from the discussion in the same paragraph, it is more than clear that the Division Bench was considering case which was referable to Section 135(1)(i) read with Section 123 of the Act. For, it has observed that

the first and the second entries in Part II of 1st Schedule of the Code are relevant for the purpose of that case. First and second entries of Part II of 1st Schedule refer to offence punishable with imprisonment of three years and upwards. However, in the present case, we are concerned with punishment which may extend to three years, or with fine, or with both, which according to the Petitioner-Applicant, is referable to Entry No.3 in Part II of the 1st Schedule. Before I proceed to examine the matter further, it will be appropriate to reproduce the relevant portion of the discussion which weighed with the Division Bench of the Gujarat High Court while opining that offence under Section 135 of the Customs Act is non-bailable. The same reads thus :

> "The first and the second entries are relevant for our purposes. By virtue of the first entry in respect of offences against other laws, that is to say, laws other than Indian Penal Code, an offence punishable with imprisonment for a period exceeding seven years is classified as non-bailable. So also by virtue of entry No.2 an offence punishable with imprisonment for a period of three years and upwards but not exceeding seven years is also classified as non-bailable. (see column 2). An offence under Section 135

> of the Customs Act is in any event punishable with a sentence of imprisonment exceeding three years. (When the value of the goods in respect of which the offence is committed does not exceed rupees one lac the offence is punishable with imprisonment for three years. When it exceeds rupees one lac Section 123 of the Customs Act is attracted. The conditions specified therein being satisfied the offence is punishable with imprisonment for seven years. Thus, regardless of the value of the goods in any event the offence is punishable with imprisonment for three years. Such being the position the offence is non-bailable. The view taken by the learned Single Judge in Miscellaneous Criminal Application No.1202 of 1979 is not correct. The decision has been rendered *per incuriam* having regard to the fact that the aforesaid provisions of the Code were not brought to the notice of the learned Single Judge. It cannot be considered as good law. Counsel for the arrested persons also concedes that such is the position and does not dispute it. That is why we have referred to proposition No.(1) as an undisputed proposition." (emphasis supplied)

. On a fair reading of the abovesaid decision, it is more than clear that the Division Bench of the Gujarat High Court was considering a case, which was punishable with sentence of imprisonment exceeding three years and more particularly referable to Section 135(1)(i) read with Section 123 of the Act.

9. On the above arguments, learned Counsel for the Petitioner-Applicant contends that offence under Section 135(1)(ii) of the Act is a bailable offence, especially having regard to the Scheme of the provisions of Act read with provisions of the Code.

10. On the other hand, Counsel for the Respondents submits that the plain language of Section 135 (1)(ii) of the Act would belie the argument canvassed on behalf of the Petitioner-Applicant. He submits that when the Legislature has provided that the term of imprisonment may extend to three years, that means the punishment to be imposed may be upto three years and if it is so, entry 3 in part II of First Schedule of the Code will have no application. In that case, contends learned Counsel, Entry 2 in Part II of Schedule I of the Code will have to be invoked. If it is so, contends learned Counsel for the Respondents, the offence will have to be held as non-bailable offence, as has been held by the Gujarat High Court. To buttress the submission that the punishment may extend to three years would

mean that the punishment to be imposed will be up to three years, reliance is placed by the learned Counsel on the exposition of the Apex Court in the case of **Intelligence Officer, Narcotics C.Bureau vs. Sambhu Sonkar & Anr. reported in (2001) 2 SCC 562.** In the said decision, while construing provisions of Section 137 of the Narcotic Drugs and Psychotropic Substances Act, 1985, which provides for imprisonment for a term which shall not be less than ten years but for rigorous imprisonment for a term which may extend to five years, the Apex Court has held that it would mean that the offence is punishable for a term of imprisonment up to five years. On the above arguments, learned Counsel for the Respondents contends that even offence punishable under Section 135(1)(ii) is a non-bailable offence.

11. At this stage, I would like to make it clear that this is the limited controversy which I intend to examine in the present Judgment and this Judgment may not be construed as expression of opinion on any other issue relating to the case already filed or yet to be filed against the

Petitioner-Applicant by the Respondent Authority.

12. After considering the rival submissions, I have no hesitation in accepting the submission canvassed on behalf of the Petitioner-Applicant that the offence "under Section 135(1)(ii)" is a bailable offence. This is so, because firstly, the said offence has been made a non-cognizable offence by virtue of the non-obstante clause in Section 104(4) of the Act. Secondly, it is triable "summarily" by a Magistrate by virtue of Section 138 of the Act. Moreover, Section 135(1)(ii) provides for punishment as imprisonment for a term which may extend to three years, or with fine, or with both. Indeed, it is provided that imprisonment may extend to three years; but the same provision also provides for alternative punishment of fine (only) or imprisonment and fine both. The question is, merely because the punishment of imprisonment provided for is for a term which may extend to three years i.e. three years, does it mean that it will fall in Entry 2 of Part II of First Schedule of the Code and not in Entry 3 thereof. To appreciate this aspect, it may

be necessary to advert to the scheme of the Code, which has application to the case on hand. On analysing the Part I of the First Schedule of the Code, the Scheme of the Code is that, non-cognizable offences have been made bailable, except the non-cognizable offences such as under Sections 194, 195, 466, 467, 476, 477 and 493, which provide for punishment of more than three years of imprisonment. The only exception where punishment of imprisonment which may extend to three years and still has been made non-bailable, is Section 505 of the Indian Penal Code. But that is an exception. We shall now specifically advert to the non-cognizable offences where punishment provided is imprisonment which may extend to three years, or fine, or both, as is the case in the present enactment; and in Part-I of the First Schedule to the Code, those offences have been made bailable. These offences are under Sections 181, 193 (IInd part), 201 (IInd part), 205, 214 (IInd part), 225A, 312 (Ist Part), 404, 418, 484, 485, 487 and 488 of the Indian Penal Code. In other words, all these offences under the Indian Penal Code, the punishment provided is imprisonment,

which may extend to three years, or with fine, or with both, even then have been made bailable. In that sense, the Scheme of the Code is indicative of the Legislative intention that non-cognizable offences punishable with imprisonment which may extend to three years, have been treated on par with offences where imprisonment is for "less than three years", so as to make them bailable. Applying the same analogy to the case on hand, Section 135(1)(ii) of the Act, which provides for punishment similar to several provisions in the Indian Penal Code, as referred to above, I have no hesitation in holding that the subject offence is bailable; and moreso, when the offence in question is required to be tried summarily by the Magistrate by virtue of Section 138 of the Act.

13. As has been noted earlier, the decision of the Gujarat High Court, no doubt, makes a general observation that offence under Section 135 is non-bailable. However, the said decision is not an authority on the proposition that offence under Section 135(1)(ii) of the Act is non-bailable offence - because the Gujarat High Court was called

upon to examine the question in the context of offence under Section 135(1)(i) read with Section 123 of the Act, which position is reinforced from the observations in the Judgment from the portion extracted hereinbefore.

14. A priori, the argument of Mr.Nalawade for Respondents that the expression "imprisonment may extend to three years" be construed as "imprisonment up to three years" and in which case entry 2 in Part II of the Ist Schedule of the Code would be attracted, does not commend to me. Indeed, Mr.Nalawade has placed reliance on the decision of the Apex Court in **Intelligence Officer, Narcotics C.Bureau (Supra)** to buttress his submission. However, the construction given by the Apex Court was in the context of the enactment before it and the Legislative intent of curbing the practice of giving bail on technical ground in a crime which adversely affect the entire society including lives of number of persons and the object of making stringent provisions for control of illicit traffic in narcotics drugs and psychotropic substances. There is nothing in the Customs Act to

suggest that such approach is warranted insofar as offences under Section 135(1)(ii) of the Act are concerned. On the other hand, offences under Section 135(1)(ii) are unrelated to goods which are notified under Section 123 of the Act and are, therefore, dealt with differently. Inasmuch as, Section 138 of the Act postulates that the trial in respect of such offences - under Section 135(1)(ii)- is of summary nature to be tried by the Magistrate.

15. For the aforesaid reasons, I have no hesitation in accepting the arguments of the Petitioner-Applicant that the offence under Section 135(1)(ii) of the Act is bailable. This view is also reinforced from the Customs Manual issued by the Ministry of Finance dated September 1, 2001 (1st Edition), which is a contemporaneous exposition by the administrative authorities and a relevant guide to the interpretation of the expressions used in the Statute. Para 26 of the said Manual plainly concedes that the offence under Section 135(1)(ii) of the Act is non-cognizable and bailable offence. In the light of the instructions

issued by the Finance Ministry, it was not open to the Respondents to argue to the contrary. In any case, for the reasons already recorded hereinbefore, the Application preferred by the Applicants herein should succeed. In other words, as the offence under Section 135 (1)(ii) is a non-cognizable and bailable offence, the question of Magistrate remanding the Applicant to judicial custody does not arise. At the same time, as the offence is bailable offence, there is no question of granting anticipatory bail with regard to that offence. Even if the Applicant was to be arrested by the Officer of the Customs in exercise of power under Section 104 of the Act, as the offence is one under Section 135(1)(ii) of the Act and therefore, bailable, the Officer would be obliged to release the Applicant on bail by virtue of Section 104(3) of the Act.

16. Accordingly, the Petition as well as the Application are disposed of on the above basis.

17. It is, however, once again made clear that disposal of these Applications is no expression of

opinion on the merits of the case, pending enquiry against the Petitioner-Applicant with the Customs Authorities or to be instituted on the basis of further materials available, which may include disclosure of offence under some other provisions such as Indian Penal Code. The Authorities will be free to deal with those matters in accordance with law.

18. At this stage, Counsel for the Respondents prays that the operation of this order be stayed for a period of six weeks, on an assurance that the status-quo as of today shall be maintained insofar as the present Petitioner-Applicant are concerned.

19. I find this request reasonable. Accordingly, operation of the present Judgment is stayed for a period of six weeks to enable the Respondents to carry the matter in appeal, if so advised.

A.M.KHANWILKAR, J.